

**Cleanco Nuclear, Inc. and Robert Govoni. Case 2-
CA-19079**

16 March 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 27 June 1983 Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me on March 17, 18, and 31 and April 1, 1983. The charge herein was filed by Robert Govoni on August 23, 1982, and a first amended charge was filed on August 26, 1982. The complaint was issued by the Regional Director for Region 2 of the National Labor Relations Board on October 29, 1982. In substance, the complaint as amended at the hearing alleged as follows:¹

1. That various employees of Respondent, in August 1982, concertedly protested their wages and benefits.

2. That on August 19, 1982, certain of Respondent's employees engaged in a strike or work stoppage in furtherance of their demands for higher wages and benefits.

3. That on August 19, 1982, various officers and supervisors of Respondent threatened employees with discharge and blacklisting unless they abandoned their work stoppage.

¹ At the close of the hearing, the General Counsel withdrew par. 6(a) of the complaint because no evidence was adduced to support it. It alleged that on August 19, 1982, the Respondent by Supervisor Arthur Mueller threatened employees with discharge.

4. That on August 20, 1982, Respondent discharged its employees Robert Govoni, Dennis Thompson, Steven Freiling, Wayne Collins, MacLeod Raines, James Smith, William Lofton, and William Lyman because of their activities set forth above in paragraphs 1 and 2.

Respondent's basic assertion is that it did not threaten any employees as alleged by the General Counsel and that it did not discharge any of the employees involved. It contends that when the employees engaged in the work stoppage on August 19 and 20, it urged them to return to work and that, at most, it told the employees that they could be replaced. Respondent asserts that when these employees did not return to work on August 20, it assumed, based on the conversations held, that they were quitting, and that it made arrangements to replace them by transferring other of its employees to the work-site in question and by hiring additional employees. It also asserts that except for Wayne Collins, the other alleged discriminatees did not offer to return to work at anytime after August 20. As to Wayne Collins, Respondent contends that, although he did request his job back in November 1982, it had no openings for him.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Cleanco Nuclear, Inc. is a New York corporation performing, inter alia, cleaning and nuclear decontamination services for various utilities in New York and other States. It is conceded that, annually, Respondent performs services valued in excess of \$500,000 for enterprises located outside the State of New York. Respondent also admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE OPERATIVE FACTS AND CONCLUDED
FINDINGS**

The incidents involved herein occurred in connection with services performed by Respondent for Consolidated Edison (Con Ed) at the latter's nuclear power plant located at Indian Point, New York. In relation to its contract with Con Ed, Respondent employed, in August 1982, approximately 60 employees who were classified as radiation technicians.² As these employees work in "off limit" areas of the nuclear facility, they are issued badges by Con Ed which permit them access to the plant.³

About the beginning of August 1982, it appears that some of Respondent's employees (who at that time were

² Cleanco's contract with Con Ed requires it to provide certain minimum and maximum crews depending on the needs of Con Ed.

³ Before a badge is issued to an employee of a subcontractor, it must be shown to Con Ed's satisfaction that the employee has a designated work function at the site and that he poses no security risk. When a person's employment with a subcontractor terminates, for example, because he quits or is fired, his badge is removed. Badges can, however, be reinstated if the employee resumes work.

not represented by any labor organization),⁴ began talking among themselves regarding their wages and benefits. Thereafter, a letter dated August 13 was transmitted to Respondent.⁵ This letter, which was signed by 19 of Respondent's employees, read as follows:

Due to the high cost of living caused by inflation and other factors, we employees of CLEANCO are asking you to consider a pay increase for the experienced De-Con Technicians on site here at INDIAN POINT. We believe that our experience and expertise has been and will be beneficial to the company but we find ourselves at a lower pay scale than employees recently hired. This situation we find intolerable and we ask that you rectify it. We are also asking for a percentage of a group Medical, Dental and Life Insurance to be paid by the company.

We are respectfully submitting this request to you in good faith and we hope you will respond in same by August 18, 1982.

When no response was made to the above letter, a number of the employees decided to have a sick out commencing on Thursday, August 19, 1982. Thus, on August 19, about 20 of Respondent's employees gathered at the Peekskill, New York train station where they each proceeded to call in sick.

After the employees called in sick, employee Greg Weston placed a call to the Company's New York City office and spoke with Mel Hensch, a vice president. According to Mr. Hensch,⁶ and essentially corroborated by Kevin McDermott, who listened in on an extension, Weston asked if the petition had been received and what the Company was going to do about it. Hensch asked Weston if he was the spokesman and when the latter said no, the phone was given over to Dennis Thompson. According to Hensch, he told Thompson that, as the petition had been received on August 17, the Company had not had time to respond to it. He also testified that he told Thompson that, as far as he could see, the employees involved were not a majority and that the Company could not negotiate. At this point, according to Hensch, Thompson said that the employees would not return until the Company negotiated and agreed to certain wage and benefit demands. Hensch states that he told Thompson that this sounded like an ultimatum, that it would be best if the men returned to work so that Cleanco could fulfill its contractual obligations to Con Ed, and that the Company would be glad to meet with any group of spokesmen who represented a majority when they returned to work.

A short time later (about 9 a.m.), Thompson again called Hensch and said that the men were not willing to return to work until after the Company's representatives met with them. According to Hensch, when he again re-

ceived a negative reply to his request that they return to work, Thompson said that the group wanted their final paychecks, and that Thompson read off a list of employee names. Hensch states that he agreed to bring up the final checks that afternoon and that he thereupon instructed the payroll department to make up the regular checks and the final checks for the work done to date.⁷ According to Hensch and McDermott, they assumed that the employees, through Thompson, were indicating their intention of quitting.

According to Thompson, on the morning of August 19, he spoke with Hensch on the phone on two occasions. He states that on the first occasion he told Hensch about the petition, whereupon Hensch said that he could not discuss it unless the men came back to work. Thompson asserts that, on the second occasion, he told Hensch that the employees wanted Hensch to come up and talk to them, whereupon Hensch said that, if he had to come up, he was bringing their checks. According to Thompson, he asked Hensch what he meant by "checks" and that when Hensch reiterated that he was going to bring them up, he told Hensch, "if that's the way it is, that's the way it is." Thus, according to Thompson's version, he did not ask for any checks, much less the final checks, and he implies that he understood Hensch's comments as meaning that the employees were about to be discharged.⁸

According to Mel Hensch, when the checks were not ready on time, Supervisor Vincent Stasio was dispatched to tell the strikers that Hensch and McDermott would be up with the checks a little later. Stasio arrived at the parking lot of Oscar's Restaurant about 1 p.m., where he met with the striking employees. According to Stasio, he told the employees that the checks were late whereupon they left to go to a nearby park. He also states that he again met with them about an hour later, after Mel Hensch and Kevin McDermott left the checks with him.

The General Counsel presented as witnesses five of the employees who are alleged as discriminatees in this proceeding. These were Dennis Thompson, John Raymond Smith,⁹ Wayne Jubal Collins,¹⁰ Steven Freiling, and William Lyman. All these witnesses testified to a meeting with Stasio on August 19, but give somewhat divergent accounts of what took place.

According to Mr. Lyman, Stasio told the group that they were jeopardizing their positions with the Company and that, if they did not return to work, they would be terminated. He states that he told Stasio that he would not return under the conditions that existed. On cross-examination, Lyman testified that, after he and Govoni related their concerns about conditions at Indian Point, Stasio said that there was nothing he could do about it

⁴ It appears that, subsequent to the events in this case, a union organized Respondent's employees and that Respondent thereafter recognized and entered into a collective-bargaining agreement with that union.

⁵ Although there is some dispute as to precisely when the letter was transmitted to the Company, it is clear that it was given no later than August 18.

⁶ Weston was not called as a witness.

⁷ Normally, the checks are a week behind and given out on Fridays. Final checks are ordinarily given when an employee quits or is discharged.

⁸ There was testimony from Respondent's witnesses to the effect that during conversations they had with various employees on August 19, that these employees had been told by Thompson that they had been fired.

⁹ It appears that he also is referred to as James Smith.

¹⁰ Wayne Collins has a brother named Michael Collins. As noted *infra*, Michael Collins also participated in the sick outs on August 19 and 20, but did return to work on August 20 about 11:30 a.m.

and that it would be beneficial if the employees went back to work. Lyman further states that at one point Stasio gave out checks but that the employees handed them back.

Dennis Thompson testified that at the parking lot meeting, Stasio said that he was there to tell the employees that Mel Hensch was on his way up with the checks. Thompson states that Stasio told the group that they should go back to work and that if they did not, "there is not going to be a job."

John Smith testified that Stasio said that it would be best if the employees returned to work and not cause any problems. He asserts that Stasio said that, after the employees went back to work, the Company would have someone come up and talk to them. Smith states that he told Stasio that if the Company wanted to talk, they could do their talking now. On cross-examination, Smith testified that Stasio, basically, was trying to get the people back to work and that he said that management would talk to them, provided they were not trying to have an employee takeover. Smith did not testify to any threats by Stasio.

Wayne Collins testified that Stasio said that the employees should go back to work, give the Company 10 days, and that management would talk to them about their problems. Wayne Collins did not relate any threats of discharge by Stasio.

Steven Freiling also testified about a meeting with Stasio at the parking lot, which he asserts occurred around 1 p.m. He states that he asked Stasio, when Stasio was handing out checks, "does this mean I'm fired." Freiling says that Stasio answered in the negative, whereupon he told Stasio that he did not want his check. As to his refusal to accept the check, Freiling testified that he would not take his check unless told that he was fired, which Stasio refused to do. Like Collins and Smith, Freiling did not relate, in his testimony, that Stasio made any threats of discharge.

Stasio's version of these events is as follows. He states that, on the morning of August 19, he was in the office when Mel Hensch got the phone call from Weston. He states that he overheard Mel Hensch's side of the conversation wherein Hensch asked the men to go back to work and that he heard Hensch agree to bring up the paychecks. According to Stasio, when the checks were not ready by 11:30 a.m., he was dispatched to go upstate and tell the Employer that Mel Hensch and Kevin McDermott would be late in arriving with the checks.

According to Stasio, when he arrived at the parking lot, he first met with employee Ed Carballo who said that he did not want to be part of the sick out and asked if he could go back to work. Stasio states that he said yes. He also states he met Hector Mayorial who also indicated that he wanted to go back to work, but could not return until Friday. Stasio states that he told Mayorial that this was no problem. A few minutes later, according to Stasio, about 14 or 15 employees approached him and stated their feeling that they were getting a run around from the Company. Stasio testified that he told them that they were going about it the wrong way and that, if they went back to work, they could probably solve their problems a lot easier than by taking a job

action. They disagreed. According to Stasio, when they asked why Mel was not there, he told them that their checks had not yet been processed, whereupon they said that the checks had been promised for 1 p.m. At this point, according to Stasio, the group left, albeit, Mayorial, Carballo, and William Lyman stayed behind. In this respect Stasio asserts that he never said anything about discharges at this or any other time.

Stasio testified that, about 5 minutes later, Mel Hensch and Kevin McDermott showed up and that he related what had just occurred. He also states that, after conversing briefly with Mayorial and Carballo, they were told that they could take the rest of the day off and come back to work on Friday, August 20. According to Stasio, when Lyman was informed of the presence of Hensch and McDermott, Lyman left, and the group of Stasio, Hensch, and McDermott waited at the parking lot for about a half hour. When the strikers did not show up, Stasio was given the checks (in envelopes), whereupon Hensch and McDermott went to Con Ed.

Stasio states that the men soon came back and that he then called Con Ed to advise Hensch and McDermott of their return. He states that the employees complained about the absence of Hensch and McDermott, and reasserted their opinion that the Company was giving them a run around. At this point, according to Stasio, the employees asked for their paychecks and he proceeded to hand them out, while some of the employees were putting their uniforms on Stasio's car. He states that after distributing about four or five pay envelopes, Govoni took them from the employees and said that he wanted a letter indicating that the employees had been discharged. Stasio asserts that he refused to give such a letter, telling the employees that no one was being discharged. According to Stasio, Govoni gave him back the checks. (As noted above, this is consistent with the testimony of Freiling who testified that he handed his check back because Stasio refused to tell him that he was being discharged.)

Stasio testified that, when Hensch and McDermott returned, he gave the checks to Hensch. He states that Hensch told the employees how much the Company needed them, that the Company had a commitment to meet, and that, if necessary, the Company would replace the strikers. According to Stasio (and confirmed by Hensch and McDermott), when Govoni claimed that he had spoken to a backup contractor who could take over the job and was willing to meet the employees' demands, Hensch said that there was no such backup contractor. Stasio states that, when Hensch began handing out checks, Govoni again insisted that the employees be told that they were being fired. When Hensch said that no one was fired, Govoni handed back the checks.

Mel Hensch and Kevin McDermott basically corroborate the version of events as set forth by Stasio. They assert that they arrived at the parking lot and waited, with Stasio, for the men's return after speaking with Carballo, Mayorial, and Lyman. They state that, when the strikers did not show up, they left the paychecks with Stasio and went to the Indian Point facility where they spoke with Con Ed's waste manager, Michael O'Kel-

ley.¹¹ According to Hensch and McDermott, O'Kelley wanted to know if Cleanco would be able to fulfill its contract with Con Ed. They state that they told O'Kelley that they could do so, even if it meant bringing in employees to replace the strikers. They testified that, when they received a call that the strikers had returned to the parking lot, they left the plant to speak to the striking employees.

According to Hensch and McDermott, when they got back to the parking lot, they urged the men to return to work and told them that if they represented a majority, the Company would negotiate with them. They also state that, when some of the employees were taking their paychecks, Govoni asked if they were being fired and that he was told no. Both Hensch and McDermott assert (and Dennis Thompson basically confirms) that Govoni said that, if the employees were not fired, they did not want their checks.

Regarding the tender of the checks, the evidence herein shows that Govoni and other employees were unwilling to accept their checks unless they were specifically told that they were being discharged. There is, in fact, little doubt in my mind that the subject of discharge was brought up by Govoni and the strikers, and not by Cleanco's management. That is, based on the testimony of Dennis Thompson, I am of the opinion that the strikers believed that if they accepted the checks without being told that they were discharged, that they would not be eligible for unemployment benefits because it would be concluded that they had quit their employment. In this respect, it seems to me that these employees, many of whom were residents of other States, did not distinguish in their own minds the difference between striking and quitting and as such, insisted on being told that they were discharged in order to be eligible for unemployment benefits.¹²

Subsequent to the meetings described above, the officials and supervisors of Cleanco met at Oscar's Restaurant where they were joined by Michael O'Kelley. O'Kelley's concern was to ascertain from Cleanco whether and how Cleanco intended to fulfill its contract with Con Ed.¹³ Mel Hensch assured O'Kelley that Cleanco would meet its commitments, stating that some of the strikers would return to work and that the Company could obtain replacements for the remainder.

According to Steven Freiling, about 7 p.m. he went to Oscar's restaurant and encountered O'Kelley with Hensch and "a few other people." Freiling testified that O'Kelley stated to him that unless the men returned to work by 9 a.m. the next morning, they would be fired and that O'Kelley would do his best to have them blackballed from the nuclear industry. Freiling states that, al-

though Mel Hensch did not say anything, he did nod his head in affirmation. According to Freiling, there were a couple of other employees with him at the time, but he could not recall their names.

Respondent's witnesses basically agree that O'Kelley made the threatening remarks as alleged by Freiling. They indicate, however, that Hensch did not agree with O'Kelley and that, in fact, Hensch objected to O'Kelley's remarks as being an interference with Cleanco's affairs and being unfair to the Company and to its employees. According to Mel Hensch, O'Kelley made his remarks in the presence of Freiling, Smith, and Wayne Collins.¹⁴

With respect to the above, O'Kelley, who testified as the General Counsel's witness, stated that he went to Oscar's restaurant on the afternoon of August 19 because he was very concerned as to how many people Cleanco would have working at the site. He states that he was told that Cleanco would have an adequate work force for the next day. According to O'Kelley, he told Cleanco's people that he did not care about the details of the problem, that he just wanted to know how many employees would be there. In his direct examination, O'Kelley stated that Mel Hensch said that the people who refused to work would be fired, but that McDermott said they would not be fired because they had already quit. However, later in his testimony, O'Kelley said that he was not sure if Mel Hensch used the word "fired" or "replaced." O'Kelley's present recollection was that this conversation was in the context of Cleanco's response to his inquiries as to whether Respondent would be able to meet its commitments and that the response was that Cleanco could, if necessary, replace the work force. O'Kelley also acknowledged, with some hesitation, that he did make statements to the effect that any employees who did not come to work by 9 a.m. on August 20 would be permanently barred from the site and that if other companies asked him for references, he would give the employees bad references. O'Kelley's admission of these threats was brought out by questions asked by Respondent's counsel.

During the evening of August 19, various of the Company's supervisors were sent out to find the employees and to try to convince them to return to work. In this regard Wayne Collins testified that Jim Hensch and Jack Curtis visited him at his hotel where they told him that they had just come from a meeting with O'Kelley and McDermott. Collins states that Jack Hensch and McDermott told him that if the employees were not at work by 9 a.m., they would be fired and blackballed from the nuclear industry. According to Collins, two newly hired employees were present when these remarks were made. Collins could not, however, recall their names.

Smith testified that Jim Hensch and Curtis visited him at his hotel and that they spoke to him outside his room. He states that the two supervisors told him that if the employees did not return to work by 9 a.m. they would

¹¹ O'Kelley, however, denied that he spoke to Hensch and McDermott at the plant on August 19. There is, nevertheless, no doubt that Mel Hensch was at the plant on the afternoon of August 19, as Michael Skotzko, Con Ed's security administrator, recalls speaking with Hensch at the plant on that date. There also is no doubt that O'Kelley did speak with Hensch and McDermott later in the afternoon at Oscar's restaurant.

¹² In New York State strikers are entitled to unemployment benefits after 7 weeks.

¹³ It is possible that Hensch and McDermott mistakenly recalled their conversation with O'Kelley in the restaurant as being the one they had with him at the plant. The substance, in any event, is basically the same.

¹⁴ There are some differences among Respondent's witnesses as to which employees they recalled being present when O'Kelley made his remarks. According to McDermott and Jack Curtis, Wayne Collins and Smith were present. According to Jim Hensch and Vincent Stasio, Freiling was present.

be fired, that their security badges would be pulled, and that they would never work in another nuclear facility. According to Smith, Wayne Collins was present during this conversation. It also is noted that, according to Freiling, he was present in the hotel room when Curtis and Jim Hensch appeared. He states, however, that the supervisors spoke to Smith outside the room and therefore outside his presence.

Both Jim Hensch and Jack Curtis acknowledge that they went to the Lindross Hotel where they state that they spoke with Collins, Smith, and Freiling. They assert that they merely asked them to return to work and to go to Oscar's Restaurant to talk with Kevin McDermott. They both denied making the threats attributed to them.

According to Collins and Smith, after the visit from Curtis and J. Hensch, they went to Oscar's Restaurant where McDermott said that the Company would not tolerate this type of employee action, that it had replacements coming in, and that if the employees were not back at work, their badges would be pulled and they would be fired. For his part, McDermott denies making such threats and he testified that during that evening he spoke with several employees, including Blackburn and Michael Collins, wherein he assured them that they would not be discharged. With respect to Michael Collins, McDermott states that Michael Collins said that he wanted to return to work but did not want to disassociate himself from the strikers. According to McDermott, he and Michael Collins agreed that the latter could come back to work later on Friday. In fact, Michael Collins, who called in sick on Friday morning, did return to work about 11:30 a.m. after he and the others received their checks on August 20. (This latter transaction will be discussed below.)

There was testimony from a number of Con Ed's security people about security badges and conversations with Cleanco's people about the job action.¹⁵ Since the facility is a nuclear power plant, all persons employed by Con Ed's subcontractors must be issued security badges in order to gain access to the site. When a new employee is hired by a contractor, his name is forwarded to Con Ed for a security check and, if passed, the employee is issued a badge. When an employee is discharged or quits, his badge is pulled. An employee's badge may also be pulled if, in Con Ed's judgment, the person exhibits aberrant behavior. With respect to badges, the contractor has an obligation to notify Con Ed as to when an employee is no longer working. A badge which has been pulled may, however, be reinstated when an employee resumes his or her employment. As relates to this case, Con Ed's people testified that the fact that an employee's badge has been pulled does not necessarily translate into a conclusion that the employee has been discharged.

According to Michael Skotzko, Con Ed's security administrator, he was told by his guards on the morning of August 19 that Cleanco's employees were involved in a job action. He testified that he then asked Jim Hensch what was the status of Cleanco's employees and was told by Hensch that he would get back to him. Skotzko states that later in the day he spoke to Mel Hensch at the site

and told him that he needed clarification. He states that Mel Hensch also said that he would get back to him.

According to James Fitzimmons, Con Ed's supervisor of security, on the afternoon of August 19 a person from Cleanco called him and said that 16 employees were involved in a labor dispute and that Fitzimmons should hold their badges. Fitzimmons, however, could not say who this person was. He also states that he was not certain as to what the status of these employees was going to be and that nothing definitive was being done.¹⁶

According to Skotzko, on August 20 he reviewed the security log and saw that 16 badges had been pulled. He states that he then spoke to Mel Hensch telling Hensch that he needed written clarification as to which employees no longer had a work function. According to Skotzko, Hensch said he would get back to him and that on Monday, August 23, Skotzko, received a list of eight names.¹⁷ Skotzko testified that he did not know who sent the list, which is unsigned, and that (Skotzko added the following notation: "Above persons permanently barred from CD 1 and 2. Please post files and barred from site book." With respect to this list, it should be noted, however, that Skotzko testified that no one from Cleanco ever told him that the employees had been discharged. At most, Skotzko testified that he had a conversation with Jim Hensch wherein the latter said that he had "gotten rid of the problem."

Regarding the above, Mr. O'Kelley testified that on the morning of August 20 he told Jim Hensch that he wanted to know what was going on and that Hensch said that some of the people had not yet decided if they were returning to work. O'Kelley states that Hensch said that he would furnish a list by the weekend. According to O'Kelley he did receive a list through one of his supervisors on Sunday, August 22, whereupon he told Jim Hensch that the list was supposed to go to Skotzko. O'Kelley had no recollection of any further conversation with Jim Hensch at this time and did not recall if Jim Hensch said that the people on the list had been fired.

With respect to the badges and the list, Cleanco's witnesses assert that they never told anyone from Con Ed that the employees had been fired or that their badges should be pulled. It is, indeed, my opinion that all the testimony concerning these matters is entirely more innocent as to Cleanco than the General Counsel asserts. It seems to me that, when the strike commenced, Con Ed's security people wanted to ascertain who was not coming to work and pressed Mel and Jim Hensch for clarification on this on August 19. As the situation was still fluid, Cleanco probably advised Fitzimmons on the afternoon

¹⁶ Although in the realm of conjecture, it is possible that given Skotzko's questions to Mel and Jim Hensch, someone from Cleanco called Fitzimmons during the afternoon and reported that 16 employees were still involved in the strike. (By about 1 p.m. at least 2 of the 20 strikers had indicated that they were returning to work.) As it seems clear to me that, on August 19, Cleanco had not discharged any employee, and as the entire situation was still up in the air, it is entirely possible that Fitzimmons was asked to hold badges. This scenario is at least consistent with Fitzimmons' testimony that nothing definitive was being done as of August 19.

¹⁷ The names were R. Govoni, W. Lyman, M. Raines, J. Smith, J. Collins, S. Freiling, B. Lofton, and D. Thompson.

¹⁵ These persons were called as the General Counsel's witnesses.

of August 19 that the work status of 16 employees was still uncertain and Fitzsimmons held their badges with the understanding that no definitive action was being taken. On August 20, Con Ed through O'Kelley continued to press Cleanco as to whether certain of its employees were going to return to work and O'Kelley was told that some still had not yet made up their minds. As per O'Kelley's request, Cleanco offered to furnish a list of those who did not return to work by the weekend, which was done and transmitted to Skotzko. There is, in fact, no competent evidence to establish that during any of the conversations between Con Ed's people and Cleanco's people the latter group ever advised Con Ed that any employees were going to be, or were, discharged.¹⁸ It was Skotzko who wrote on the list that the eight named employees were permanently barred. As to why Skotzko wrote this, I do not have a satisfactory explanation, unless it is conjectured that he received such an instruction from O'Kelley who had threatened this action on August 19 at Oscar's Restaurant.

In any event, returning to August 20, many of the people who had called in sick on August 19 returned to work at the start of the shift. The employees who remained out and who again called in sick were Smith, Wayne Collins, Freiling, Lyman, Lofton, Raines, Govoni, Thompson, Parker, and Michael Collins.¹⁹ According to Smith, this group went on to the site about 10 a.m. but could not get in because their badges were pulled. He states that he then phoned Jim Hensch and told him that the employees were at the gate and wanted their checks. The employee witnesses for the General Counsel generally agree that, when Jim Hensch came down to the guard house with the checks, the employees asked if they were being fired. They also agree that initially Hensch refused to tell them that they were fired, but that after some give and take, and after refusing to take their checks, Jim Hensch finally told them that they no longer worked for the Company. At this point, according to the employees, they took their checks and departed. However, Michael Collins, who was part of this group, also took his check, but returned to work soon thereafter.

According to Jim Hensch, when he came down with the checks (as per Smith's request), the employees refused to take them unless he told them that they were fired. He credibly testified that he did not tell them that they were discharged and that they finally accepted the checks and left.

On August 21, Wayne Collins met Jack Curtis at a wedding. At the wedding, Jack Curtis asked Collins why he had not come back to work. According to Collins, he responded that he would not return under the existing conditions. According to Curtis, Collins said that he and

his friends, Freiling and Smith, were going home to Arkansas. Curtis also testified that he had a similar conversation with Collins later in the week.

While the General Counsel argues that the above conversations should not be construed as constituting valid offers of reinstatement, I do not believe that this evidence was adduced by Respondent on that point. Rather, it is evident that this evidence was offered in order to show that neither Curtis nor Collins understood that the latter had, in fact, been discharged. For if Collins had been discharged on August 20 because he failed to return to work by the alleged 9 a.m. deadline, it would seem highly improbable that Supervisor Curtis would ask Collins on two occasions over the next week why he was not returning to work. It also seems odd that Collins, in response to such inquiries, did not say that the reason he was not coming back to work was because he had been fired.²⁰

Dennis Thompson testified that, about 2-1/2 weeks after August 20, he telephoned Respondent's president, Gene Belsole, and asked why he could not return to work. Thompson states that Belsole told him that as Con Ed had pulled his badge Thompson had no security clearance. Belsole denied that he ever had any such conversation with Thompson. Thompson also testified that, on one occasion after August 20, he went to the Peeks-kill unemployment office and that the person there phoned Cleanco on his behalf. He states that this person told him that Cleanco said that it would not hire Thompson. This last bit of evidence is, of course, unvarnished hearsay and as such is disregarded. (The identity of this person is unknown to me.)

Finally, Kevin McDermott and Supervisor Art Mueller testified without contradiction that, for about a week after August 20, Govoni kept calling in sick on his and the other employees' behalf. (Govoni did not testify in this proceeding.) This too tends to support Respondent's contention that the people involved herein were not discharged. For if they had been discharged, it would make little sense for Govoni to continue to call in sick.

The General Counsel argues that Respondent's version of the events is "too calculated, too precise, and absent of the realism that gives rise to human events of this nature." While it may be said that Respondent's witnesses were indeed very precise and mutually corroborative, I do not view this as a detriment to its case. On the contrary, I was favorably impressed by the demeanor of Respondent's witnesses and by the detail with which they gave their testimony. Recognizing that the ultimate truth may not always be ascertainable by the trier of fact, and given that the risk of nonpersuasion rests on the General Counsel, it is my opinion that Respondent's witnesses were credible and should be believed. Therefore, it is concluded that Cleanco's representatives did not threaten the striking employees with discharge, blacklisting, or with being barred from Con Ed's facility. Nor do I conclude that Mel Hensch adopted the threats made by

¹⁸ I do not construe the remark by Jim Hensch to Skotzko that he had "gotten rid of the problem" as being tantamount or equivalent to a statement that the strikers had been fired. To me, all this means is that by August 23, the problem had been resolved from Cleanco's point of view inasmuch as it had been able to man the jobs through those who did not strike, through those who returned to work and through replacements.

¹⁹ As noted above, Michael Collins had told the Company on the previous evening that he was going to return to work but did not want to do so until later in the day because he did not want to appear to break ranks with the strikers.

²⁰ In November 1982, Wayne Collins sent a letter to Cleanco requesting reinstatement. Respondent's witnesses credibly testified that the reason Collins was not offered reinstatement at that time was because there were no open positions for him.

Con Ed's representative Michael O'Kelly. Finally, I do not conclude that Respondent discharged the eight employees as alleged in the complaint. While it may be that these employees were told that they would be replaced if they did not return to work, and thereafter interpreted this to mean that they were being discharged, I do not believe that Jim Hensch, by his words or conduct, discharged these employees.²¹

CONCLUSIONS OF LAW

1. Cleanco Nuclear, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

²¹ Although it would be unlawful for a company to discharge economic strikers, it is not unlawful for a company to permanently replace them.

2. Respondent has not engaged in any conduct which was violative of the Act.

Based on the entire record in this proceeding, I make the following recommended²²

ORDER

It hereby is ordered that the complaint be dismissed in its entirety.

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.